

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARLOS OSORIO)	
Claimant)	
VS.)	
)	Docket No. 264,203
NATIONAL SERVICE COMPANY)	
Respondent)	
AND)	
)	
CLARENDON NATIONAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from a May 24, 2001 preliminary hearing Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Claimant asks the Appeals Board to review the finding that claimant's intoxication contributed to the injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Order of the Administrative Law Judge should be affirmed.

Claimant was injured on December 29, 2000, when he became entangled in a conveyor. The parties stipulated that, at the time of the accident, claimant's blood alcohol level was .162.

K.S.A. 44-501(d)(2) provides in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol . . . It shall be conclusively presumed that the

employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more . . .

Because claimant's blood alcohol concentration exceeded .04 at the time of his accident, claimant is conclusively presumed to have been impaired. However, the burden is still on respondent to show that claimant's impairment due to alcohol contributed to his accident.

The issue regarding whether alcohol intoxication contributed to an injury, disability or death, thus allowing denial of liability under K.S.A. 44-501(d)(2) is a certain defense under K.S.A. 44-534a and subject to review by the Appeals Board from a preliminary hearing order.

While it is the claimant's burden to establish the claimant's right to an award of compensation by proving all of the various conditions on which the claimant's right depends by a preponderance of the credible evidence [see K.S.A. 44-501 and K.S.A. 44-508(g)], it is the respondent's burden to establish an affirmative defense such as a contribution by an employee's use or consumption of alcohol.

Although not stated in the Order, the Administrative Law Judge, in denying claimant's claim for compensation, must have found that the alcohol use contributed to the accident. The Appeals Board agrees.

Claimant ignored safety requirements and company policy by climbing onto a conveyor in order to wash an adjacent wall. Claimant had been trained to follow lock-out procedures to prevent a conveyor from moving before attempting such a maneuver. Furthermore, it was unnecessary for claimant to be on the conveyor in order to accomplish the task assigned to him, because there was a distance of three to four feet between the conveyor and the wall. Claimant's testimony that he was instructed to stand on the conveyor is not credible. This conveyor stops and starts automatically. The fact that claimant chose to stand on a conveyor, in contravention of his training and common sense, in order to wash a wall three to four feet away demonstrates that his judgment was impaired. The Appeals Board finds it probable that claimant's impaired judgment was due to the level of alcohol concentration in his blood at the time. The level of alcohol would also have affected claimant's balance, coordination and reflexes. It is probable that claimant's impairment affected his ability to avoid being struck by the pallets moving down the conveyor belt. Therefore, claimant's injury was contributed to by his consumption of alcohol.

The Appeals Board finds the respondent has met its burden of proving the intoxication defense.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order Denying Compensation by Administrative Law Judge Pamela J. Fuller, dated May 24, 2001, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2001.

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Darin M. Conklin, Topeka, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director